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**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY PEARSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0604-CR-296

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Commissioner
Cause No. 49G03-0409-FC-171082

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Gregory Pearson appeals his conviction for fraud on a financial institution. He contends that the trial court abused its discretion when it denied his motion to withdraw his guilty plea because (1) he proclaimed his innocence after entering his guilty plea but before the plea was accepted by the trial court; (2) the trial court failed to adequately establish a factual basis for the charge; and (3) his conviction would subject him to possible deportation and, therefore, result in a manifest injustice. We hold that Pearson's expression of innocence after the guilty plea hearing was not sufficiently contemporaneous with his guilty plea so as to mandate withdrawal of his plea, and we find that the trial court established a sufficient factual basis when Pearson admitted to the truth of the charging information and the State's recitation of the facts. Further, we hold that deportation is but a possible consequence of the commission of a crime and, therefore, does not subject a defendant aware of the possibility of deportation upon conviction to any manifest injustice. Finding that the trial court acted within its discretion, we affirm.

Facts and Procedural History

On September 20, 2004, Pearson attempted to withdraw \$91,158.68 from a bank account he had established with Charter One Bank using another individual's social security number. As a financial institution, Charter One Bank is required by federal law to report all transactions over \$10,000.00 to the Internal Revenue Service. By using a social security number that did not belong to him, Pearson would have caused Charter One to provide a false report to the federal government. Charter One Bank branch

manager Kelly Martin called the police to report this fraudulent activity, and Pearson was later arrested and charged with one count of Fraud on a Financial Institution, a class C felony.¹

For approximately fifteen months, the case against Pearson was proceeding toward a jury trial. However, on December 27, 2005, Pearson filed a Motion to Vacate Jury Trial and Reset Matter for Guilty Plea Hearing, which was granted by the trial court. On January 5, 2006, Pearson filed a Motion for Continuance of Guilty Plea Hearing, citing concerns regarding the possible effects of a felony conviction on his immigration status,² which could include deportation. This motion was granted, and the guilty plea hearing was rescheduled for January 20, 2006, in order to give Pearson time to investigate the matter.

At the January 20 hearing, Pearson entered into a plea agreement with the State whereby he agreed to plead guilty to fraud on a financial institution in exchange for the

¹ Ind. Code § 35-43-5-8.

² Pearson, who was twenty-one years old at sentencing, moved to the United States from his home country of Jamaica when he was twelve years old. According to the Presentence Investigation Report, his United States citizenship status was “pending” at the time of his arrest. 8 U.S.C. § 1227(a)(2)(A)(i) provides:

Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

* * * * *

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

dismissal of charges under two other cause numbers. The trial court first read Pearson pertinent portions of the charging information, providing:

THE COURT: Well, I'm going to read to you what you're offering to plead guilty to. . . .

* * * * *

Gregory Pearson, on or about or between October 6, 2003, and September 20, 2004, did commit the crime of Fraud on a Financial Institution, that is: did knowingly execute, or attempt to execute, a scheme or artifice to obtain any of the money, funds, credits, assets, securities under the control of a federally insured financial institution, that is: Charter One Bank by means of [] false or fraudulent pretenses, representations, or promises, that is: represented to Kelly Martin a false Social Security number when opening an account and then attempting to withdraw the money from said account that required reporting of said withdrawal to the federal government. That, sir, is a class C felony you're offering to plea[d] guilty to, do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Do you understand in order for you to be guilty of what you'd like to plead guilty to, the facts I just read to you must be true, you understand?

DEFENDANT: Yes, sir.

THE COURT: And, by pleading guilty you're admitting true those facts, you understand, sir?

DEFENDANT: Yes, sir.

Tr. p. 6-7. The trial court then asked Pearson various questions aimed at determining whether Pearson was entering the plea in a voluntary, knowing, and intelligent manner and whether Pearson was aware of the effect of the plea on Pearson's rights as a criminal defendant, and Pearson responded affirmatively to these questions. *Id.* at 7-12.

Following this exchange, Pearson's counsel moved the court to take Pearson's guilty plea under consideration but to withhold establishing a factual basis and entering a

conviction pending the completion of a Presentence Investigation Report (“PSI”). The trial court, noting that this was an unusual request, granted the motion as to entering a conviction but denied it as to establishing a factual basis. Notably, the court stated, “quite realistically, I’ve taken a factual basis by having them [sic] under oath and reading the—reading [the charging information] to him and him admitting it.” *Id.* at 13.

The trial court then instructed the prosecution to continue with its presentation of a factual basis, wherein the prosecuting attorney provided:

Had this case proceeded to trial, the State would have proven beyond a reasonable doubt that on September 20, 2004, Deputy Hollcraft . . . was met by Ms. Kelly Martin. She stated that a black male later identified as Gregory A. Pearson . . . was attempting to withdraw \$91,150.68 from a Charter One Bank account using a Social Security number that did not belong to him. Uh, Charter One is required by federal statute to report any financial transactions over \$10,000 to the Federal Internal Revenue Service. Mr. Pearson, by using a false Social Security number, was causing Charter One to provide a False Financial Report to the federal government.

Id. at 14-15. The trial court then engaged Pearson as follows:

THE COURT: Sir, did you hear the factual basis as read by a prosecutor?

DEFENDANT: Yes, sir.

THE COURT: Are those facts correct?

DEFENDANT: Yes, sir.

THE COURT: Having heard the factual basis do you still wish to enter into a guilty plea?

DEFENDANT: Yes, sir.

THE COURT: All right. Well, I’m going to, uh, make a finding there’s a factual basis but I’m not entering a judgment of conviction at this time, take it under advisement and order a PSI.

Id. at 15. The trial court then set a date to continue the hearing on February 24, 2006.

On February 15, 2006, Pearson filed a motion to withdraw his guilty plea. This motion was not verified and failed to set forth any reason supporting withdrawal. The trial court denied the motion that same day. On February 22, 2006, the State filed a PSI, which included the following statement made by Pearson: “I told [my attorney] to retract my plea because I was forced to take it. I did not commit the fraud.” Appellant’s App. p. 83.

On February 23, 2006, Pearson filed a verified motion to withdraw his guilty plea, which indicated that Pearson had consulted with immigration attorneys besides his former immigration attorney. Citing those consultations and having had the “opportunity to further reflect on the terms of the agreement and legal impact that it may have on him as relating to his immigration status [i.e., possible deportation],” *id.* at 91, Pearson indicated that he “believes that this plea would work a manifest injustice.” *Id.* Therefore, claiming that the State would not be prejudiced and citing “the fact that the plea agreement was only under advisement, no conviction has been entered and the plea has not been accepted,” *id.* at 92, Pearson sought to withdraw his guilty plea.

The trial court conducted a hearing on the motion on February 24, 2006, taking the matter under advisement. On March 2, 2006, the State filed a response to Pearson’s verified motion to withdraw his guilty plea wherein it only argued that Pearson had ample time to consult with immigration attorneys before he entered his guilty plea and that he failed to meet his burden to prove with specific facts that he should be permitted to withdraw his plea. *See id.* at 95 (*citing Fletcher v. State*, 632 N.E.2d 1164, 1166 (Ind. Ct. App. 1994), *vacated by* 649 N.E.2d 1022 (Ind. 1995)).

On March 7, 2006, Pearson filed an Amended Verified Motion to Withdraw Guilty Plea. He argued therein that deportation would constitute a manifest injustice in his case because he had not lived in Jamaica since he was twelve years old, his entire family lived in the United States, and he would be unable to assimilate to Jamaican society because he had no contacts in the country. Pearson also reiterated that he had learned of these potential consequences as a result of a change in immigration counsel, and he again denied committing the crime with which he was charged.

On March 10, 2006, the trial court denied Pearson's motion to withdraw his guilty plea. Specifically, the trial court found that Pearson had testified under oath that he desired to plead guilty; that he had testified under oath to the factual basis; and that, in the opinion of the court, it was not manifestly unjust for him to face the consequences of deportation for a crime he admitted to committing. The trial court then cited Pearson's lack of a criminal history and proceeded to impose a two-year sentence suspended to one year on probation. Pearson now appeals the denial of his amended verified motion to withdraw his guilty plea.

Discussion and Decision

On appeal, Pearson contends that the trial court should have granted his amended verified motion to withdraw his guilty plea. Specifically, he argues that the following support his position: (1) Pearson claimed innocence after he entered but before the trial court accepted his guilty plea; (2) the trial court failed to adequately establish a factual basis for the charge; and (3) Pearson proved that his conviction would result in a manifest injustice. We address each of these issues in turn.

I. Standard of Review

Indiana Code § 35-35-1-4(b) states the applicable standard when a defendant seeks to withdraw a guilty plea:

After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. . . . The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Our appellate courts have interpreted this statute to require a trial court to grant such a request where the defendant “proves that withdrawal of the plea is necessary to correct a manifest injustice.” *Weatherford v. State*, 697 N.E.2d 32, 34 (Ind. 1998) (citation omitted). “The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State.” *Id.* “Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.” *Id.*

The trial court's ruling on a motion to withdraw a guilty plea comes to us with a presumption in favor of the ruling. *Id.* “An appellant of an adverse decision on a motion to withdraw must prove the court abused its discretion by a preponderance of the evidence. In evaluating a defendant's arguments on this point, we will not disturb the trial court's ruling where it was based on conflicting evidence.” *Id.* (citations omitted).

At the outset, we note that the State does not suggest that withdrawal of Pearson's guilty plea would result in substantial prejudice to its case. Having removed that particular consideration from our analysis, we proceed to address Pearson's specific arguments.

II. Proclamation of Innocence Following Plea Hearing

Pearson first argues that the trial court should have permitted him to withdraw his guilty plea because he proclaimed his innocence before the trial court formally accepted his plea. The trial court did agree to withhold entering a conviction as requested by Pearson at the guilty plea hearing, but this does not support Pearson's argument that he should therefore be allowed to withdraw his plea at least up until the time a conviction is formally entered.

Indiana's appellate courts have long held that a trial court may not accept entry of a guilty plea when it is accompanied by a defendant's contemporaneous expression of innocence. *See Ross v. State*, 456 N.E.2d 420, 423 (Ind. 1983); *Harshman v. State*, 232 Ind. 618, 621, 115 N.E.2d 501, 502 (1953). In non-capital cases, this principle, which has come to be known as the Harshman-Ross Rule, requires that a defendant express his innocence at the same time—i.e., generally, during the same proceeding in which—he pleads guilty. *See Johnson v. State*, 734 N.E.2d 242 (Ind. 2000); *Moredock v. State*, 540 N.E.2d 1230 (Ind. 1989); *Bewley v. State*, 572 N.E.2d 541 (Ind. Ct. App. 1991), *trans. denied*; *but see Patton v. State*, 517 N.E.2d 374, 376 (Ind. 1987) (trial court must set aside guilty plea in a capital case even though defendant only proclaimed his innocence at sentencing hearing held after guilty plea hearing), *reh'g denied*.

Pearson argues, however, that “no clear rule has emerged for non-capital cases where a defendant pleads guilty but, before acceptance of the plea and before sentencing, the same defendant proclaims his innocence.” Appellant's Br. p. 8. He asks us, then, to

hold that a defendant should be permitted to withdraw his guilty plea until a trial court formally accepts the plea and enters a conviction thereon.

Our Supreme Court addressed this issue in *Carter v. State*, 739 N.E.2d 126 (Ind. 2000). Like Pearson, the Defendant in *Carter* argued that he should be permitted to withdraw his guilty plea because the trial court had not yet formally accepted it. The *Carter* court, however, held that “court permission is required to withdraw a guilty plea, even when the plea has not been accepted and the withdrawal request is based upon a protestation of innocence.” *Id.* at 130.³ The trial court did not abuse its discretion, then, by denying Pearson’s motion to withdraw his plea based on the fact that the court had not formally accepted the plea.

III. Establishment of Factual Basis

Pearson next argues that the trial court should have allowed him to withdraw his guilty plea because it never properly established a factual basis upon which to accept the plea. A trial court may not accept a guilty plea unless a sufficient factual basis has been established for the plea. Ind. Code § 35-35-1-3(b). Trial court determinations of an adequate factual basis are presumed to be correct, and we review claims of error under an abuse of discretion standard. *Butler v. State*, 658 N.E.2d 72, 77 (Ind. 1995).

An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State’s presentation of evidence on

³ In his brief, Pearson refers to this Court’s underlying opinion of *Carter v. State*, 724 N.E.2d 281 (Ind. Ct. App. 2000), which was summarily affirmed by the Indiana Supreme Court. *See* 739 N.E.2d at 131. In our opinion in that case, we abrogated *Brooks v. State*, 577 N.E.2d 980, 981 (Ind. Ct. App. 1991), the lone Indiana case holding that a trial court must allow withdrawal of a guilty plea for a defendant in a non-capital case who proclaims his innocence in a proceeding subsequent to that in which he entered a guilty plea. Failing to recognize the Indiana Supreme Court’s subsequent ruling in *Carter*, Pearson now asks us to revive the rule of *Brooks*. We point out that our Supreme Court agreed, however, that *Brooks* was an errant decision on this issue. *See Carter*, 739 N.E.2d at 131.

the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges.

Madden v. State, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998).

Here, Pearson contends that his responses to the trial court's questioning regarding the truth of the allegations contained in the charging information and in the State's recitation of the factual basis at the guilty plea hearing were not detailed enough to provide an adequate factual basis. Both after the trial court read the charging information to him and after the State recited its proposed factual basis, the trial judge asked Pearson if the facts presented were true and if he admitted guilt based on those facts. In both exchanges, Pearson replied, "Yes, sir."

Pearson attempts to distinguish this from other cases by arguing that "Yes, sir" is inadequate to support a factual basis. For example, he refers to the defendant in *Carter v. State*, who stated at his guilty plea hearing that he was pleading guilty because he "shot somebody." 724 N.E.2d at 283. While we agree with the *Carter* court that this specific statement was sufficient to support a factual basis under the facts of that case, we do not agree with Pearson that such a descriptive statement is necessary to provide an adequate factual basis. Pearson was asked if the facts in the charging information, which alleged that he committed the crime in question,⁴ were true. He said, "Yes, sir." He was later

⁴ Pearson briefly argues that the charging information itself was "simply ambiguous and insufficient upon which to properly base any objective evaluation of guilt." Appellant's Br. p. 12. Pearson fails to support this statement or explain how the information was ambiguous or insufficient, and our review of the charging information leaves us convinced that it was entirely adequate under the circumstances, where Pearson admitted the truth of the facts therein and his guilt of the crime charged.

asked if the facts as recited by the State were true, and he said, “Yes, sir.” He was asked if, after acknowledging the truth of those facts and being aware that their truth was sufficient to support his guilt, he still wished to plead guilty to his crime. He said, “Yes, sir.” He admitted “the truth of the allegations in the information read in court,” *see Madden*, 697 N.E.2d at 967, and presented by the State, and so the trial court established an adequate factual basis. No abuse of discretion occurred.

IV. Manifest Injustice

Pearson last argues that the trial court should have allowed him to withdraw his guilty plea because he demonstrated that withdrawal was necessary in order to correct a manifest injustice, that is, the possibility that he will be deported as a result of his conviction. “The trial court is required to grant a motion to withdraw a guilty plea only if the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.” *Bland v. State*, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999) (citing *Coomer v. State*, 652 N.E.2d 60, 62 (Ind. 1995)). “[M]otions made within a few days of the initial pleading should be favorably considered.” *Fletcher v. State*, 649 N.E.2d 1022, 1023 (Ind. 1995) (quotation omitted). However, “[u]nless the defendant proves a manifest injustice by a preponderance of the evidence, the trial court has discretion to grant or deny the request.” *Bland*, 708 N.E.2d at 882.

Pearson requested a continuance of his guilty plea hearing on January 5, 2006, based on his recent discovery that a felony conviction could have a “grave impact” on his immigration status. Appellant’s App. p. 71 (Motion for Continuance of Guilty Plea Hearing). The hearing was continued until January 20, 2006, and Pearson makes no

claim that he was unaware of the possibility of deportation at that hearing. Indeed, the fact that he requested a continuance indicates that he was aware of the possibility fifteen days before he entered his guilty plea, providing him ample time to research and seek legal advice on the matter.⁵ By every indication, Pearson entered his plea knowingly with regard to the possibility of deportation.

Pearson argues, nevertheless, that he should be permitted to withdraw his guilty plea because it is unfair and unjust for him to be subjected to deportation for his crime. At his sentencing hearing and in both his brief and his reply brief, Pearson referred many times to the hardships that he would face if deported. Addressing this contention, the trial court recognized that Pearson could face deportation at the discretion of the United States Immigration and Naturalization Service but remarked that “I don’t consider it unfair . . . that he has to face Immigration [sic], when he admitted under oath that he did what he was accused of doing.” Tr. p. 35. We agree that it is not unfair or unjust for an individual who is admittedly guilty of his crime to face the penal and collateral consequences of that crime. The trial court did not abuse its discretion.

Affirmed.

BAILEY, J., and BARNES, J., concur.

⁵ Pearson indicates in his verified motion for withdrawal of his plea that, at some point, he obtained new immigration counsel and confirmed that he could face deportation. He does not, however, directly indicate that any of his prior immigration attorneys failed to inform him regarding deportation. At the very least, he was clearly aware of the possibility when he requested a continuance of the guilty plea hearing.